UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

JOSEPH F. LAFFEY, Petitioner, vs. JOHN F. AULT, Warden, Respondent.	No. C04-1004-MWB **REPORT AND RECOMMENDATION ON MOTION TO DISMISS**

On January 15, 2004, the petitioner John Laffey ("Laffey") filed a petition for writ of *habeas corpus* under 28 U.S.C. § 2254. (Doc. No. 1) On April 1, 2004, he filed an amendment to the petition. (Doc. No. 15) On June 21, 2004, the defendant John F. Ault (the "State") filed a motion to dismiss and a supporting brief (Doc. No. 17), arguing the petition is a "mixed" petition. Laffey resisted the motion on June 7, 2004. (Doc. No. 19) On June 9, 2004, the State filed a reply brief. (Doc. No. 20) The court now considers the motion to be fully submitted.

I. INTRODUCTION

Laffey is challenging his convictions, following a jury trial, on two counts of second degree sexual abuse with children under the age of twelve, and the sentence

imposed on those convictions. The facts of the case, as described by the Iowa Supreme Court, are as follows:

> Laffey's convictions arise from an incident allegedly occurring in early December 1996, when he engaged two young girls, ages five and six, in a sex act. Neither girl told anyone about what had happened, however, until the following March. At that time, the girls initially stated that they had seen the defendant without his pants on and that he was "playing with his crotch." Upon further questioning by employees at the Child Protection Center (CPC), the girls revealed that Laffey had them touch and stroke his penis while he was lying on the bed.
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> When confronted with these allegations, Laffey related an incident that had occurred when the girls had stayed overnight at his home. He stated that the next morning after he had showered, the children entered his bedroom before he had put his pants on. He told the girls to leave and they did, according to Laffey.
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> The State charged Laffey with two counts of second-degree sexual abuse. At trial, the victims testified consistently with their interviews at CPC. The jury returned guilty verdicts on both charges. The judge sentenced the defendant to indeterminate, twenty-five-year terms of imprisonment for each crime, ordering that these sentences be served consecutively.

State v. Laffey, 600 N.W.2d 57, 59 (Iowa 1999) (*Laffey I*).

Laffey appealed from his conviction, raising four issues: (1) he asserted the evidence was insufficient to support the jury verdict; (2) he claimed his counsel rendered ineffective assistance in failing to object to several courtroom procedures that he contended violated his right of confrontation under the Sixth Amendment to the United States Constitution; (3) he challenged his consecutive sentences as cruel and unusual punishment under the Eighth Amendment to the United States Constitution; and (4) he

challenged his consecutive sentences as an abuse of discretion. *Id.*, 600 N.W.2d at 58. The court (1) affirmed the convictions, finding the evidence sufficient to support the convictions; (2) preserved for post-conviction relief his claim of ineffective assistance of counsel; and (3) found no Eighth Amendment violation; but (4) remanded the case for re-sentencing, holding that the district court judge abused his discretion by relying on an improper factor to justify the imposition of consecutive sentences.[1]

Upon remand, Laffey again raised his Eighth Amendment claim at the time of re-sentencing. A different district court judge rejected the Eighth Amendment argument and again sentenced Laffey to two consecutive twenty-five-year sentences. Laffey again appealed. In this appeal, he argued only that the trial court had abused its discretion by imposing consecutive sentences without giving sufficiently specific reasons for doing so, and without taking into consideration appropriate factors in making its sentencing decision. He did not reassert his Eighth Amendment claim following resentencing. The Iowa Court of Appeals affirmed Laffey's sentence. *State v. Laffey*, No. 00-0844, 2001 WL 194873, at *3 (Iowa Ct. App., Feb. 28, 2001) (*Laffey II*). Laffey filed an application for further review, which was denied by the Iowa Supreme Court. Procedendo was issued on May 29, 2001.

On July 7, 2002, Laffey filed an application for post-conviction relief in Iowa district court, but he dismissed his application on January 23, 2003.

In his petition for *habeas corpus* filed in this case, Laffey raises two issues: (1) whether the testimony of the two victims was so "inconsistent, improbable and incredible that a rational fact finder could not find proof of guilt" under federal due

[1] In imposing consecutive sentences, the trial judge noted several sentencing considerations, including the fact that it would be difficult to explain to the young victims why the defendant was being punished for only one of the crimes but not the other. *Laffey*, 600 N.W.2d at 62. The Iowa Supreme Court held this was an impermissible factor to consider in determining the appropriate sentence. *Id*.

process standards; and (2) whether the imposition of consecutive sentences under the facts of this case constituted a violation of Laffey's rights under the Eighth Amendment to the United States Constitution. In the pending motion to dismiss, the State argues Laffey has not exhausted his second issue, and therefore his "mixed petition" should be dismissed. Laffey responds that he has exhausted his remedies in state court on this issue.

II. LEGAL ANALYSIS

The United States Supreme Court, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999), held:

> Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.

Id., 526 U.S. at 842-43, 119 S. Ct. at 1731 (citations omitted). Similarly, subsection 2254(c), 28 U.S.C. § 2254(c), provides:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Iowa law provides for direct appeal of a criminal conviction as a matter of right. Iowa Code§ 814.6(1)(a) (1983). A direct appeal must be filed within thirty days from the final judgment. Rule 101, Iowa Rules of Appellate Procedure.

After his trial and sentencing, Laffey timely filed a direct appeal, raising both of the issues he is asserting in this action. The Iowa Supreme Court ruled against him on these issues. However, after he was resentenced following remand to the state district

court, he did not reassert his Eight Amendment argument in his second direct appeal to the Iowa Supreme Court. In its motion to dismiss, the State argues that Laffey, therefore, has failed to exhaust his state remedies on this issue.[2]

Laffey disagrees. He argues his second sentence was not a "new" sentence at all, but instead he was sentenced to the same term of imprisonment as before. He argues the only difference was the sentencing judge did not consider the sentencing factor which the Iowa Supreme Court found to be improper, to-wit: "the difficulty that might be experienced in explaining the rationale of concurrent versus consecutive sentencing to young victims[.]" *Laffey I,* 600 N.W.2d at 62. Laffey argues he received "the same sentence, imposed on the same facts, from the same trial, in the same criminal action on the same case number in the same state district court." (Doc. No. 19, ¶ 7)

Laffey argues further that he offered the Iowa courts a full opportunity to rule upon his Eighth Amendment claim in the context of his first appeal, and he consciously did not raise the issue again in his second appeal because he believed the issue "had already been determined, and the first appellate decision was law of the case." (*Id.*, ¶ 10) He argues the cases cited by the State all involved petitioners' attempts to raise a federal question for the first time in federal court, without providing the state courts with an opportunity to rule on the issue themselves. (*Id.*, ¶ 8)

The parties argue at some length about whether the Iowa Supreme Court's discussion of Laffey's Eighth Amendment issue was, or was not, dicta. Whether deemed to be dicta or not, the undersigned finds the Iowa Supreme Court fully discussed the issue in *Laffey I*. As such, it appears raising the identical issue again on appeal after resentencing would have been futile. The Eighth Circuit Court of Appeals has held this

[2]The State agrees Laffey's first issue has been exhausted.

type of futility may constitute a defense to the rule requiring the exhaustion of state remedies. *See Hawkins v. Higgins*, 898 F.2d 1365 (1990) (citing *Piercy v. Black*, 801 F.2d 1075, 1077 (8th Cir. 1986) for the proposition that "a decision on the same question of law, under almost identical facts, made state court remedies futile"); *accord Padavich v. Thalacker*, 162 F.3d 521, 522 (1998) ("We have recognized the futility of requiring a habeas petitioner to exhaust state remedies when the state court has recently decided the same legal question adversely to the petitioner under nearly identical facts.") (citing *Hawkins* and *Piercy*).

As the *Padvich* court noted, the "exhaustion rule is not a rule of jurisdiction, and sometimes the interests of comity and federalism are better served by addressing the merits." *Id*. (internal quotation marks omitted). The undersigned find that course of action is appropriate here, and therefore recommends the petitioner's Eighth Amendment argument be addressed on its merits after full briefing by the parties.

III. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[3] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this

[3]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

Report and Recommendation, that the respondent's motion to dismiss be denied, and a briefing schedule be issued.

IT IS SO ORDERED.

DATED this 9th day of February, 2005.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT